



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TRG

Docket No: 4351-99

19 September 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN,
[REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Navy filed enclosure (1) with this Board requesting, in effect, that he be placed in the same situation he was in prior to the general court-martial which has now been set aside.

2. The Board, consisting of Mr. Pfeiffer, Mr. Zsalman and Mr. Beckett, reviewed Petitioner's allegations of error and injustice on 12 September 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner reenlisted in the Navy on 30 July 1990. He then received two nonjudicial punishments, on 31 June and 3 December 1992, for disobedience and drunk driving. On 6 November 1995, Petitioner was convicted by a general court-martial of committing an indecent assault with a child under the age of 16 years. He was sentenced to six months confinement at hard labor, a reduction in rate to pay grade E-1, and a dishonorable discharge.

d. On 18 June 1999, the Navy-Marine Corps Court of Criminal Appeals set aside the findings and sentence of the general court-martial because testimony was admitted during the proceedings which showed that Petitioner had terminated his interview with an NCIS agent so he could be represented by counsel. Although the

court authorized a rehearing, no such action was taken and Petitioner was restored to duty. Subsequently, his request to be retained on active duty to qualify for retirement and/or to retire under the provisions of TERA was denied. On 4 December 1998 he was issued a general discharge. At that time he was credited with 18 years, 2 months and 5 days of active service.

e. Attached to enclosure (1) is an advisory opinion from the Office of Legal Counsel, Navy Personnel Command which notes that the local commanding officer did not have the authority to involuntarily separate an individual such as Petitioner with over 18 years of active service. The opinion also notes that 10 U.S.C. 1175(a) (actually 1176(a)) required Petitioner's retention on active duty until he qualified for transfer to the Fleet Reserve, unless he was "sooner retired or discharged under any other provision of the law." Finally the advisory opinion notes that Petitioner had received two nonjudicial punishments and had been convicted by a civil magistrate of reckless driving and concluded that a general discharge was appropriate in this case.

CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants partial favorable action. Since Petitioner had over 18 years of active duty, the Board concludes that he should have been retained on active duty to qualify for transfer to the Fleet Reserve in accordance with the applicable provision of law 10 U.S.C. 1176(a). Therefore the record should be corrected to show that he was not discharged on 4 December 1998 but continued to serve on active duty until the earliest possible date to transfer to the Fleet Reserve at the completion of 20 years of active duty. This date is estimated to be 1 November 2000 but the actual date will be as determined by the Navy Personnel Command.

Concerning the characterization of service the Board substantially concurs with the recommendation contained in the advisory opinion that the characterization of service on transfer to the Fleet Reserve should be under honorable conditions. Given this conclusion the Board also concludes that an RE-4 reenlistment code is appropriate in this case and should not be changed.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged on 4 December 1998 but continued to serve on active duty until first eligible to transfer to the Fleet Reserve. The date of transfer to the Fleet Reserve is estimated to be 1 November 2000 but the actual date will be determined by

the Navy Personnel Command.

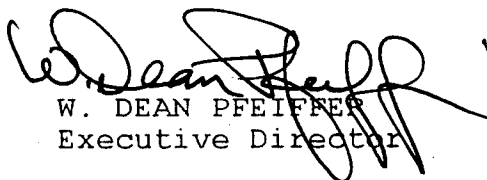
- b. That the remainder of Petitioner's requests be denied.
 - c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.
 - d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director